IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2944/06
In the matter between:

LOUISE ELLEN DANIELZ N.O. **Applicant**

and

PETROLEEN MAUREEN DE WET **1st Respondent**

VON LIERES COOPER BARLOW ATTORNEYS **2nd Respondent**

And in the matter between:

PETROLEEN MAUREEN DE WET **Counter Applicant**

and

LOUISE ELLEN DANIELZ N.O. **1st Respondent**

OLD MUTUAL LIFE ASSURANCE CO (PTY) LTD **2nd Respondent**

JUDGMENT : 19 JUNE 2008

TRAVERSO, AJP :

[1] The Applicant in this matter is the nominee of Old Mutual Trust Limited, the executor of the Estate of the late Deon Ivor De Wet ("*the deceased*"). She applies for a declaratory order that the First Respondent (Mrs. De Wet) is not entitled to the proceeds of certain life insurance policies taken out on the life of the deceased.

[2] The First Respondent has counter applied for the opposite relief and has joined Old Mutual Life Assurance Co. (SA) Ltd to the proceedings.

[3] The Second Respondent does not oppose the main application and has not associated itself with the counter application.

[4] For the sake of convenience I will refer to the parties as the Applicant, Mrs. De Wet and Old Mutual respectively.

[5] Mrs. De Wet was married to the deceased in community of property.

[6] On 4 March 1993 Mrs. De Wet and the deceased executed a joint Will. Mrs. De Wet was named the heir to the deceased's share of the joint estate. Mrs. De Wet repudiated the joint Will subsequent to her husband's death.

[7] Prior to his death the deceased took out certain life insurance policies with Old Mutual, the death claim value of which is R1 955 857,15. Mrs. De Wet was the sole nominated beneficiary under these policies.

[8] On 6 July 2004 Mrs. De Wet purported to cede to her attorneys, the Second Respondent, her right, title and interest in and to the massed estate and residue in the joint estate of the deceased in security for payment of professional fees owed by her.

[9] It is common cause that Mrs. De Wet and an alleged accomplice, one Ivan Benting *("Benting")* were charged with conspiracy, murder, and the unlawful possession of a firearm and ammunition.

[10] On 2 September 2004, Selikowitz, J found both the accused guilty on two counts namely:

(a) Conspiracy to assault and do grievous bodily harm to the deceased; and

b) Assault with the intent to do grievous bodily harm to the deceased.

[11] Mrs. De Wet accepted the findings of Selikowitz, J, and in fact, in opposing the relief sought by the applicant in this matter, she relied the fact that the Court found that she had not conspired to murder the deceased and that she could not have foreseen that her instructions to assault the deceased could lead to his death.

[12] Mrs. De Wet does not dispute that the deceased died of the gunshot wounds inflicted by the persons she hired to assault the deceased.

[13] In the application between the Applicant and Mrs. De

Wet there are in essence two issues, namely:

a) Whether Mrs. De Wet has a claim directly in respect of the proceeds of the four life insurance policies;

b) If not, whether she has a claim under the Will of the deceased, or by virtue of her interest in the joint estate.

[14] In the counter application the issues are:

(a) Whether Mrs. De Wet's claim against Old Mutual has prescribed.

(b) Whether Mrs. De Wet is unworthy because the facts show that Selikowitz, J should have found

her guilty of conspiracy to murder and murder.

[15] Before I deal with these issues I will consider one of the arguments put forward by Mr. Brown, who appeared for Mrs. De Wet.

[16] Mr. Brown argued that the Applicant failed to make out a case in her founding papers in that the Applicant relied solely upon the judgment of Selikowitz, J, "*from which the facts relating to the First Respondent's involvement are clear*".

[17] With reference, *inter alia*, to Hollington v. F. Hewthorn Co. Ltd, [1943] 2 All ER 35 (CA), he argued that the judgment of Selikowitz, J is a mere expression of an opinion by him, and accordingly does not constitute admissible

evidence.

[18] As a general proposition this argument is sound. However, having regard to the facts peculiar to this case, the principle in Hollington *supra* cannot apply. It is correct that a conviction is only proof of the fact that another Court considered that Mrs. De Wet was guilty of conspiring to assault her husband, and no more than that. In this matter however Mrs. De Wet admits that she conspired to grievously assault the deceased. In fact in her opposing papers she relies on the fact that she was found guilty of a lesser crime, for her contention that she is not unworthy of receiving the benefits of the various policies.

[19] Furthermore, in her founding affidavit in the counter application, she relies in terms on the fact that she was

convicted of a lesser offence for her contention that she is entitled to the proceeds of the policies. In her replying affidavit in the counter application she states:

> "***I admit that I sought to have my husband assaulted, for the reasons described in my evidence."***

[20] She furthermore relies on the reasoning of Selikowitz, J in concluding that she could not be found guilty of conspiracy to murder.

[21] In reality therefore it was never in dispute that Mrs. De Wet was convicted of conspiracy to assault and do grievous bodily harm to the deceased, and it is also not disputed that, though unforeseen, the deceased died as a result of the assault.

[22] Although, as a general principle, a counter application

stands on its own and must be decided on its own merits, in this case exactly the same legal issues are to be determined in the main application as in the counter application. In addition these issues must be decided with reference to the same facts. To adopt an overly technical approach in a situation such as this, where the relevant facts are not in issue, would, in my view lead to an untenable result.

[23] Against this background the following factual findings were either common cause or not disputed:

a) At some point prior to the deceased's death Mrs. De Wet and Benting had agreed that "*they should teach the deceased a lesson*". Mrs. De Wet paid Benting R3 000,00 as a deposit towards this end.

b) On 25 April 2000 Mrs. De Wet telephoned Benting and suggested that the time had come to go ahead with their plan to teach the deceased a lesson.

c) They did not go ahead with the plan and Mrs. De Wet called off the attack.

d) On Thursday, 27 April 2000 there was an attempted assault on the deceased.

e) On 28 April 2000 Mrs. De Wet received the money back that she had paid Benting to procure the assault on the deceased.

f) On 1 May 2000 there was a further disagreement between the deceased and Mrs. De Wet, whereupon

she decided to re-instate her plan to teach him a lesson. She thereupon implemented her plan and paid Benting a sum of money to arrange the assault.

g) She made arrangements with Benting that he should hire two assailants.

h) She also agreed that she would leave the front door of the house open to facilitate the assault on the deceased.

i) Mrs. De Wet paid the money to Benting, left the front door open to facilitate access to the property by the hired assailants, and furthermore ensured that the live-in domestic help were either in their bedrooms or in the TV room, so as to be out of the way.

j) That night one or more persons arrived at the deceased's house and shot him 18 times, killing him.

[24] On Mrs. De Wet's own admission, her plan was to assault the deceased so severely that he would be confined to a wheelchair.

[25] Selikowitz, J found that it was not possible to draw a conclusion that Mrs. De Wet intended to kill the deceased, or that it was expected or foreseen by her that he would die and accordingly the Court could not find that there was an intention on her part to murder the deceased. The Court also found that it was proved beyond a reasonable doubt that Mrs. De Wet and Benting "*together with one or more other person took the active roles in causing the assault that*

led to the death of Mr. De Wet." It is against this factual background that the Applicant seeks the declaratory relief.

Direct Claim in respect of the Policies:

[26] It is common cause on the papers that the four policies in issue are insurance policies over the life of the deceased, and that Mrs. De Wet was the sole nominated beneficiary under the policies.

[27] There are two principles of insurance law which come into play here.

a) Firstly, that an assured may not intentionally precipitate the risk insured against, and in doing so will preclude him/her from claiming the benefit of the insurance.

b) An assured who intentionally perpetrates a criminal

> act relating to the risk insured against, may render himself/herself unworthy, and in such an event a Court will not, as a matter of public policy, permit such a person to claim the benefit under the policy.

The first principle applies where the assured deliberately causes the risk. The second applies where some turpitude on the part of the assured is so connected with the risk and so repugnant to good morals, that public policy requires that the assured cannot claim the benefit under the policy.

[28] It is well established that as a matter of general principle, an offender in our law is not entitled or allowed to derive any benefit from his own criminal conduct. (See Parity Insurance Company Limited v. Marescia & Others, 1965(3) SA 430 (AD).)

[29] Accordingly Mr. Butler, who appeared for the Applicant, submitted that Mrs. De Wet was not entitled to the

benefits from the policies, since the death of the deceased resulted from her illegal or unlawful activities.

[30] When the indemnity sought is brought about by a deliberate act of the insured, the answer is simple. However, where one has to consider whether the conduct of the insured is so repugnant to the good morals of society, considerations of public policy come into play where the answer is not always an easy one, and will depend by and large on a value judgment of the Court based on the particular facts of each case. This is demonstrated by the following *dictum* in Shooter t/a Shooter's Fisheries v. Incorporated General Insurances Limited, 1984(4) SA 264 (D&CLD) at 283 D-I:

> ***"Certainly the English Courts, both before and subsequent to Beresford's case (*****which concerned a claim under a life policy where the insured had committed**

suicide), *did not regard that case as laying down any inviolable rule. Thus, for example, in manslaughter (or as we call them, culpable homicide) cases, claims may, and every often do, lie under a policy of insurance. One need look no further than cases for compensation where the negligent or even the reckless driving of an insured causes the death and a resultant claim is made under a policy such as a comprehensive motor vehicle. Hundreds of cases under such policies take place both in South Africa and England where an insured is guilty of some driving offence and yet can still claim under a policy …*

The English cases involving manslaughter are reviewed in the judgment of the Court of Appeal in case of Gray and Another v. Barr [1971] 2 All ER 949, in which Beresford's case too was considered. At 964, Salmon LJ said:

'Although public policy is rightly regarded as an unruly steed which should be cautiously ridden, I am confident that public policy undoubtedly requires that no one who threatens unlawful violence with a loaded gun should be allowed to enforce a claim for indemnity against any liability he may incur as a result of having so acted. I do not intend to lay down any wider proposition. In particular, I am not deciding that a man who has committed manslaughter would, in any circumstances, be prevented from enforcing a contract of indemnity …'"

[31] Mr. Butler relied heavily on the reasoning in Gray v. Barr, [1971] 2 All ER 949 CA to which reference is made in the Shooter case *(supra)*. The facts in Gray v. Barr are instructive. Mr. Gray and Mrs. Barr had an extra-marital affair with one another. On a particular day Mr. Barr believed his wife to be at Mr. Gray's house. He took his shotgun and entered the front door of Mr. Gray's house. Mr. Gray informed Mr. Barr that his wife was not there, but Mr. Barr went upstairs and was confronted by Mr. Gray. Mr. Barr first fired a shot from his shotgun through the ceiling of the house, and following a tussle between Mr. Barr and Mr. Gray, a second shot was discharged, killing Mr. Gray. The jury found that the shot might have been an accident and acquitted Mr. Barr. Mrs. Gray, the widow of Mr. Gray, then sued Mr. Barr for damages. Mr. Barr admitted being liable to Mrs. Gray for compensation, but in turn claimed an

indemnity under a "*hearth and home*" policy. The insurance company objected to paying the benefits to Mr. Barr on two grounds, namely:

a) That Mr. Barr had caused the event insured against deliberately; and

b) That Mr. Barr's claim was barred by public policy.

Lord Denning at p. 956g-h said the following:

> "In the category of manslaughter which is called 'motor manslaughter' it is settled beyond question that the insured is entitled to recover: … But, in the category which is here in question, it is different. If his conduct is willful and culpable, he is not entitled to recover: see Hardy v. Motor Insurers' Bureau, [1964] 2 All ER 742. I agree with the judge when he said:
>
> 'The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and lawful violence or threats of violence. If he was, and death resulted therefrom, then, ***however unintended*** ***the final death of the victim may have been, the court should not entertain a claim for indemnity.***" (Emphasis supplied)

Salmon, LJ agreed with the result although he found that Mr. Gray's death was an accident. Phillimore, LJ agreed with Lord Denning's conclusions. All the judges therefore agreed that a claim was precluded by public policy. Salmon, LJ concluded at p. 965 d:

> ***"I am confident that in any civilised society, public policy requires that anyone who inflicts injuries in the course of such an act shall not be allowed to use the courts of justice for the purpose of enforcing any contract of indemnity in respect of his liability in damages for causing injury by accident."***

[32] On the strength of the aforegoing, Mr. Butler argued that even though Mrs. De Wet did not cause the death of the deceased, public policy should dictate that she be prevented from receiving the proceeds of the policies.

[33] This submission is sound. Mrs De Wet conspired to assault the deceased grievously and she confesses that it was her intention that he should be seriously injured. She paid R20 000,00 to procure the assault which was carefully

premeditated. She actively assisted in the assault in ensuring that the front door of the house was left open and that the domestic helpers were not in the way. The consequences of her conduct were tragic. The mere fact that she did not foresee or intend these consequences does not change this. In my view the principles of public policy enunciated in Gray v. Barr, *(supra)* should apply equally to the factual scenario presently under consideration.

[34] In no civilised society should a person who deliberately and in a premeditated manner planned and participated in a vicious assault, which ultimately caused the death of the deceased, benefit from the consequences of his/her actions – even if those consequences were unforeseen.

[35] I therefore conclude that Mrs. De Wet is not entitled to

the proceeds of the insurances policies.

Can Mrs. De Wet benefit under the Will:

[36] For the reasons set out above Mrs. De Wet is, in my view, unworthy to inherit any benefit under the Will of the deceased.

[37] The maxim "*de bloedige hand en neemt geen erf*" has been part of our common law since Roman times. Murder was not the only crime which led to unworthiness. The Roman-Dutch writers mention numerous grounds upon which a beneficiary was considered unworthy to inherit. (See Ex Parte Steenkamp & Steenkamp, 1952(1) SA 744 (T) at 752 G-H.

[38] Many of the grounds will be obsolete today. To list specific grounds upon which the Courts would consider a beneficiary unworthy to inherit would be inappropriate. The

grounds are not static and the common law should be developed to include those grounds that presently offend the *boni mores* of society. Taylor v. Pim, 1903 NLR 484 at 492-4, Bale, CJ cites Domat at 493 as saying:

> ***"The causes which may render the heir unworthy of the succession are indefinite, and the discerning of what may or may not be sufficient to produce this effect depends on the quality of the facts and circumstances. Thus we are not to limit these causes to such as shall be explained in the following articles, where we have only mention of those which are expressly named in the laws. But if there should happen any other case where good manners and equity should require that an heir should be declared unworthy, it would be just to deprive him of the inheritance."***

The facts of this case, in my view, leave no doubt that Mrs. De Wet is unworthy of receiving any benefit under the Will.

[39] But Mrs. De Wet in any event repudiated the benefits of

the joint Will. So on this ground too she cannot benefit in respect of the policies under the Will.

Has Mrs. De Wet forfeited the benefits of the marriage in community of property?

[40] Mrs. De Wet contends that she has an interest in the policies by virtue of her right to her half share of the joint estate. Her contention is that since the proceeds of the policies fall into the joint estate, and since she has rights in respect of a half share of the joint estate, she is *pro tanto* the holder of rights in respect of the policies.

This contention cannot be upheld.

[41] Prior to the death of the deceased, the proceeds of the policies did not exist or fall into the joint estate. Until the death of the deceased there was no certainty that a claim would be made at the time of his death. He could, for example, have surrendered the policies on the day before his death.

[42] Upon his death the joint estate terminated. This occurs *ex lege.* (See Grimbeek v. The Master, 1926 CPD 183 at 185; Joseph v. Joseph, 1951(3) SA 776 (N) at 779 G-H; Hahlo: Husband and Wife, (5th Edition) 174 – 176.)

[43] It is only after the death of the deceased that the rights in respect of the death benefits arise. The joint estate will therefore not have a claim to an asset that arose after the joint estate had been terminated by the death of the deceased.

[44] From this it self-evidently follows that Mrs. De Wet will not, by virtue of her half share in the joint estate, have a claim to the policies.

[45] By virtue of the conclusion to which I have come it is not necessary to consider the alternative argument put forward by Mr. Butler.

[46] I turn now to the counter application and the two issues that emanate thereform, namely:

a) Whether Mrs. De Wet's claim has prescribed; and

b) Whether the evidence in the criminal case warranted a finding of conspiracy to commit murder rather than a conspiracy to assault the deceased grievously.

Prescription:

[47] Mr. Muller, for Old Mutual, submitted that it was common cause that the benefits under the policy fell due on the death of the deceased, namely, May 2000. The counterclaim was only instituted on 3 May 2006.

Accordingly it was argued that the Mrs. De Wet's claim has prescribed.

[48] The Prescription Act, No. 68 of 1969 applies to insurance contracts as it does to other contracts.

[49] In life insurance the event which gives rise to the right to payment is death during the currency of the policy. The cause and circumstances of death are generally irrelevant. For though a murderer (or Mrs. De Wet in the circumstances of this case) can never benefit from the insurance, the policy itself remains valid and the insurer is not relieved from liability *vis-a-vis* the deceased's estate. (See Davis, Gordon & Getz, The South African Law of Insurance, 4th Edition at p. 354.)

[50] Accordingly the contractual event which gave rise to

Mrs. De Wet's contractual claim against Old Mutual was the death of the deceased.

[51] Section 12 of the Prescription Act provides:

> "(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
>
> ***(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.***
>
> ***(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."***

[52] On behalf of Mrs. De Wet it was argued that the debt was not payable prior to the conclusion of the criminal proceedings. It was further argued that because Old Mutual took an attitude that it could not decide on Mrs. De Wet's entitlement to the proceeds of the life policies prior to the

finalisation of the criminal trial, prescription could only have commenced running on 10 November 2004 when Mrs. De Wet was advised of Old Mutual's decision not to pay her out as the beneficiary under the policy.

[53] But this argument erroneously equates the concept of a contractual right to performance, with a delayed decision on the part of Old Mutual whether to perform under the contract or not.

[54] Mrs. De Wet's claim is a contractual one. In terms of the contract the debt became due on the death of the deceased. In terms of Section 12(1) of the Prescription Act that will be the date upon which prescription begins to run. All the *facta probanda* to succeed in her claim against Old Mutual were known to her at the time of the deceased's

death, namely:

(a) The existence of the policies.

(b) Mrs. De Wet's nomination as a beneficiary under the policies.

c) The death of the deceased.

She did not have to await Old Mutual's decision to be able to institute her claim.

[55] I therefore find that Mrs. De Wet's claim against Old Mutual has prescribed.

[56] In view of my finding I do not believe that I need consider whether the facts of the case warranted a finding of conspiracy to murder. *Prima facie* this argument appears to

be fallacious. It will be wholly inappropriate for this Court to reconsider the finding of Selikowitz, J on the strength of certain chosen portions of the record. But this aspect requires no further discussion.

[57] In the circumstances I make the following order:

57.1 Mrs. De Wet is not entitled to, and has no claim in respect of, the proceeds of certain life insurance policies taken out by the deceased, being the following policies on his life with Old Mutual:

a) Policy no. 005995300, in the amount of R104 425,61;

b) Policy no. 0012094432, in the amount of

R1 503 001,23;

c) Policy no. 007312805, in the amount of R205 936,32;

d) Policy no. 0010784048, in the amount of R142 494,01.

57.2 The proceeds of the aforesaid life policies taken out by the deceased do not form part of the joint estate of the deceased and Mrs. De Wet.

57.3 Mrs. De Wet is not entitled to inherit from the deceased's estate.

57.4 The counter application is dismissed with costs.

57.5 Mrs. De Wet is ordered to pay the costs of the application, including such costs as the Applicant incurred by virtue of the joinder of Old Mutual and the subsequent filing of papers.

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TRAVERSO, AJP
19 JUNE 2008

"REPORTABLE"

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OLD MUTUAL LIFE ASSURANCE CO (PTY) LTD **2nd Respondent**

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APPLICATION:

Counsel for the Applicant	**:**	**Adv. J. Butler**
Attorneys for the Applicant	**:**	**C & A Friedlander Inc.** **(ref: Mr. F.W. Muggleston)**
Counsel for First Respondent	**:**	**Adv. A.D. Brown** **Adv. F.A. Roelofse**
Attorneys for First Respondent	**:**	**Colin Geoffreys Inc.** **(ref: Mr. C. Geoffreys)**
Second Respondent	**:**	**Not represented**
Attorneys for Second Respondent	**:**	**N/A**

COUNTER APPLICATION :

Counsel for the Applicant	**:**	**Adv. A.D. Brown** **Adv. F.A. Roelofse**
Attorneys for the Applicant	**:**	**Colin Geoffreys Inc.** **(ref: Mr. C. Geoffreys)**
Counsel for First Respondent	**:**	**Adv. J. Butler**
Attorneys for First Respondent	**:**	**C & A Friedlander Inc.**

(ref: Mr. F.W. Muggleston)

Second Respondent	**:**	**Adv. I.J. Muller, SC**
Attorneys for Second Respondent	**:**	**Walkers Inc.** **(ref: Ms B. van der Vyver)**
Date of Hearing	**:**	**15 May 2008**
Date of Judgment	**:**	**19 June 2008**